

Attachment to the decision maker and the public.

The citizens of Rapid City are entitled to a fair and unbiased hearing in the City of Rapid City. However there currently are and have been in the past mistakes and abuses to our hearing process.

An example is a hearing I requested on July 18, 2016. This was agenda item 17 also know as No. PW071216-12. As background, I successfully obtained a unanimous vote 6 days prior (July 12, 2016) at the Legal & Finance hearing. This unanimous vote placed my item on the Consent Calendar at the following City Council Mtg.

After July 12th and before July 18th Councilman Amanda Scott and Del Tech communicated concerning my request. I was not informed of this meeting nor was I invited to participate as required by law. This happened in the Mayors office with the Mayor present.

The result of this communication (ex-parte) was Amanda Scott pulling my item from the consent calendar. Both Amanda Scott and Public Works Director Dale Tech argued against approval. Remember I received unanimous approval on July 12th.

Dale Tech and Amanda Scott convinced Councilmen Nordstrom and Doyle to reverse their vote from July 12th. Also on July 18th Dale Tech mislead all those present at my hearing. He wrongly stated the City had installed sidewalks according to City Code on the City building near my property. This is and was clearly not true. I provided maps and photos showing otherwise at my previous hearing on July 12th.

It must be noted here that Dale Tech was never asked by Council a question concerning the sidewalks at the City owned property. He volunteered this untruthful information on his own.

Councilman Nordstrom asked Tech if the maps I provided him (Nordstrom) at the Legal & Finance meeting were current? These maps clearly showed the sidewalks in the area of my property and clearly showed the City property didn't have sidewalks installed to City Code.

As proof I offer the following video.

The proposed Fairness in Hearing Ordinance will address private meetings by the City without the knowledge of the citizen requesting a hearing. It is fundamentally based on a South Dakota Supreme Court decision dated 8/26/2009, Armstrong and Petersen verses Turner County Board of Adjustment.

On page 10 Justice Meierhenry wrote --- ***"We have said: --- A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well [as] to courts. Not only is a biased decision maker constitutionally unacceptable, but our system of law always endeavored to prevent even the probability of unfairness."***

Although local units of government are not subject to the South Dakota Administrative Procedure Act, SDCL 1-26-26 **provides a generally accepted directive against ex parte communications and can provide guidance for quasi-judicial local entities.**

Unless required for the disposition of ex parte matters authorized by law, members of the governing board or officers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. If one or more members of a board or commission or a member or employee of an agency, who is assigned to render a decision in a contested case, took part in an investigation upon which the contested case is based, he shall not participate in the conduct of the hearing nor take part in rendering the decision thereon, but he may appear as a witness and give advice as to procedure. If, because of such disqualification, there is no person assigned to conduct the hearing or render the decision, the agency shall appoint someone pursuant to § 1-26-18.1 to fulfill those duties.

A person assigned to render a decision:

- (1) May communicate with other members of the agency; and**
- (2) May have the aid and advice of one or more personal assistants.**

SDCL 1-26-26 (emphasis added). **The problem with ex-parte communications is that the opposing parties have no notice or opportunity to respond. We recently noted in the context of a judge's ex parte communication that communicating with one party without giving the opposing party notice and an opportunity to be heard would "not comport with basic understandings of due process."**

Without an Ordinance addressing these due process issues, the citizens of Rapid City will have their hearings at the City of Rapid City continue to be abused by bad behavior. The way it is now many communications between decision makers and city employees short circuit the citizens rights to a fair hearing.

Communications between an elected official and the public are different and are allowed until the final 5 days before the hearing.

The way it is now, a citizen is severely restricted from participating at his own hearing. He is made to speak first, put on a timer (3 min), and is not allowed to speak again to answer or respond to issues created during the hearing process. The only way the citizen can re-enter the conversation is if a councilman asks him a question. It should not be this way. The citizen at his own hearing should be able to respond in an orderly manner to any statements or comments affecting his hearing. The Supreme Court uses the words "**opportunity to be heard**". This opportunity

can not be restricted to a timer, or procedure that doesn't allow the citizen to agree or disagree with comments by restricting his very right to speak again. This Ordinance addresses this problem.

If a decision maker has ex-parte communications he is required to disclose these communications at the beginning of the hearing and is required to recuse himself. *"HE SHALL NOT PARTICIPATE IN THE CONDUCT OF THE HEARING NOR TAKE PART IN RENDERING THE DECISION THEREON"*

The city attorney argues that a *decision maker need only disclose* at the beginning of the hearing that they participated in ex-parte communications --- *without disqualification*. Without disqualification a decision maker can violate the applicants due process and then vote. Disclosure by itself does not remove the appearance of bias or the fact the decision makers behavior has come into question.

The SDSC decision discussed in this issue clearly calls for the decision maker to **NOT** --- **TAKE PART IN RENDERING THE DECISION THEREON** ---

NOTICE THE CITY'S NEW Resolution 2016-096 --- passed by City Council in Jan. 2017

A RESOLUTION ADOPTING A CONFLICT OF INTEREST POLICY FOR ELECTED AND APPOINTED OFFICIALS OF THE CITY OF RAPID CITY.

Procedure When Conflicts of Interest Exist

If an Official who is a member of the City Council, or a board, committee, or commission has a disqualifying interest in a matter before the body on which the Official serves, he/she shall disclose the conflict to the body prior to its consideration of the matter. Once this disclosure is made, the Official **shall not** formally participate in the official discussion, any executive session, **or any vote** on the matter. If the Official has a conflict of interest in the matter and chooses to participate in the discussion, the Official should leave the dais and speak on the item from the audience as a member of the public.

A decision maker is disqualified from voting in Resolution 2016-096 --- ***but if a decision maker violates a citizens right to a fair hearing*** --- the city says ---- all he must do is ***declare*** the behavior and fully participate through the vote. This is not right or fair !!!

The South Dakota Supreme Court said in this instance on PAGE 13

Determining disqualifying interest does not involve hyper technical analysis.